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No. 426

In the Supreme Court of the United States

OCTOBER TERM, 1968

JEREMIAH J. KELLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 395 F. 2d 727.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1968. A petition for rehearing was denied on July 22, 1968. The petition for a writ of certiorari was filed on August 21, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's activities constituted the use of interstate telephone facilities in the business of wagering in violation of 18 U.S.C. 1084 and 18 U.S.C. 1952.

2. Whether petitioner's convictions for violation of 18 U.S.C. 1084 and 18 U.S.C. 1952 are vitiated because the jury also convicted him for failing to register as a person engaged in the business of accepting wagers and to pay the special tax thereon.

3. Whether petitioner was convicted by an unlawfully convened petit jury.

STATEMENT

After trial by jury in the Southern District of New York, petitioner was convicted of four counts charging him with, respectively, using interstate telephone facilities for the transmission in commerce of information assisting in the placing of wagers in violation of 18 U.S.C. 1084, using such facilities with intent to carry on an unlawful gambling activity in violation of 18 U.S.C. 1952, failing to pay the special tax imposed upon persons engaged in the business of accepting wagers, and failing to register as a person engaged in such business. He received, pursuant to 18 U.S.C. 4208(b), the maximum sentence on each count (two years, five years, one year and one year imprisonment respectively), subject to modification after study conducted pursuant to 18 U.S.C. 4208(c). The court of appeals, on the authority of *Grosso* v. *United States*, 390 U.S. 62, and *Marchetti* v. *United States*, 390 U.S. 39, reversed his convictions on the tax and registra-

tion counts, but affirmed his conviction on the other two counts.

The evidence shows that petitioner, a bookmaker, instructed his clients to call a number at a hotel in New York City (in the Southern District of New York) and ask for a fictitious name when they desired to place a wager. The operator would inform them that the person was not in, and they would thereupon give the operator a code name previously agreed upon between them and petitioner. Thereafter, petitioner would call them from his home in Brooklyn and consummate the wager. The indictment was based upon telephone calls made to the New York City number from outside New York state.

ARGUMENT

1. Petitioner was properly convicted of causing the use of interstate telephone facilities to carry on his bookmaking business. It is immaterial that his clients did not themselves violate the two statutes by calling the New York City number for the purpose of making wagers; he was not charged with causing them to act unlawfully. He was charged, rather, with causing the use of the telephone facility in New York City as a device for carrying on *his own* unlawful bookmaking activities and for transmitting information in aid thereof in interstate commerce. Petitioner was no social bettor whom (as the legislative history cited by petitioner shows) Congress did not intend to punish. He was the type of professional at whom the statutes were aimed. When he caused his clients to use the telephone for his business, he personally vio-

lated the statute, as much as if he had caused any other innocent party, *e.g.*, a temporary-hire secretary, to do so.

2. The reversal as to counts based on failure to pay the gambling tax did not require reversal of the conviction on the other counts. Petitioner's activities as a bookmaker were amply proved by independent evidence, which was as necessary to the remaining counts as to those concerned with the tax. It is unrealistic to assume that a jury would interpret a charge of failing to pay the tax as a comment on petitioner's failure to incriminate himself.

3. Petitioner, instead of supporting his challenge to the petit jury array by independent evidence, relied on the record made in *United States* v. *Van Allen*, 208 F. Supp. 831 (S.D.N.Y.), affirmed *sub nom. United States* v. *Kelly*, 349 F. 2d 720, 777-779 (C.A. 2), certiorari denied, 384 U.S. 947, where a similar challenge was denied (see Pet. 17, n. 11). As petitioner concedes, the jury clerk of the Southern District has "instituted a true random selection system" for obtaining the names of prospective jurors (Pet. 19). Petitioner's objection, rather, is to the manner in which women are excused from service, once they have been selected in a non-discriminatory manner. But there is no basis for suggestion that women are forcibly removed as potential jurors or excused against their will; they are simply not placed on the list if they do not wish to serve. This practice of freely granting excuse is similar in nature to the statutory exemption established by Congress in the District of Columbia (D.C. Code, § 11-1418), and violates neither the Constitution (*Hoyt* v. *Florida*, 368 U.S. 57) nor the statutory

scheme. *Chance* v. *United States*, 322 F. 2d 201, 204 (C.A. 5), certiorari denied, 379 U.S. 823.

Rabinowitz v. *United States*, 366 F. 2d 34 (C.A. 5), concerned the process by which potential jurymen were initially selected rather than the grounds for their subsequent excuse, and thus is not apposite to the present case. Further, the 1957 legislation on which petitioner relies contains no indication on what, if any, basis persons called to federal jury service might be exercised. S. Rep. No. 891, 90th Cong., 1st Sess., p. 10. At all events, the issue is resolved for the future by the newly enacted Jury Selection and Service Act of 1968 (P.L. 90-274, 82 Stat. 53) which goes into effect on December 22, 1968. The Act establishes for the first time uniform procedures for the granting of excuses on request by individual members of specified classes of jurors. New 28 U.S.C. 1863 (b) (5). There is thus no question of general importance raised in the petition.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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